



KOPELMAN AND PAIGE, P.C.
The Leader in Municipal Law

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December 5, 2013

Lauren F. Goldberg
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BY ELECTRONIC AND FIRST CLASS MAIL

James D. Masterman, Esq.
Greenberg Traurig, LLP
One International Place
Boston, MA 02110

Re: Baxter Road - Public Records Request – Board of Selectmen and Conservation Commission

Dear Mr. Masterman:

The law firm of Kopelman and Paige serves as Town Counsel to the Town of Nantucket. The Board of Selectmen and Conservation Commission have received your requests for public records and directed us to respond. Specifically, you have requested copies of various records concerning “coastal erosion, including but not limited to, coastal erosion affecting Baxter Road”, and several additional bulleted requests (some of which are set forth below).

The requests you have made are extremely broad in nature, and in many cases unlimited in time. As you are aware, whenever it is estimated that the cost for complying with a public records request will exceed ten dollars, a custodian must provide the requester with a good-faith written estimate prior to complying with the request. 950 CMR 32.00, et seq. Fees may be assessed at a rate of \$.20 page for photocopies and \$.50 a page for computer printouts. Further, fees may be assessed equal to the time needed to search for and segregate exempt from non-exempt records and information at the pro-rated hourly rate of the lowest paid person in the office capable of doing the required work. The good-faith response must also list any possible exemptions. Be aware that the Town will provide a revised estimate if the actual time needed to comply with the request exceeds the amount of the estimate as set forth herein, or, if you choose to narrow your request for records, the Town will provide a new estimate based upon the revised request. The exemptions and fee estimates are set forth in detail, below.

The Town expects that there are documents responsive to most of your requests, and will provide copies of such documents, subject to the payment of applicable fees under the Public Records Access Regulations, to the extent that such records exist and are subject to mandatory disclosure under the Public Records Law. G.L. c.66, §10. To the extent that responsive documents, or material contained therein, may be withheld under any of the exemptions to the Public Records Law, or pursuant to the attorney-client privilege, such documents will be withheld and/or material redacted, as appropriate. G.L. c.4, §7(26); Suffolk Construction Co. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 449-50 (2007). Although certain exemptions to the Public Records Law are cited below, the citing of such exemptions is not meant to be exhaustive. The Town expressly reserves the right to assert application of appropriate exemptions or the attorney-client privilege as the actual process of searching for and reviewing responsive records proceeds.



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Be further advised that a record holder's duty to respond to requests for information extends only to records that are in existence and in his or her custody. See G.L. c.4, §7(26); see also 950 CMR 32.03 (defining "custodian" as the public official who has routine access to or control of public records). Thus, there is no obligation to create a record in response to a public records request, or to answer questions in response to a request. G.L. c.66, §10(a); 32 Op. Att'y Gen. 157, 165 (May 18, 1977). The Town has no records responsive to the paragraphs seeking information about fees or expenses charged by the Board of Selectmen, Conservation Commission or other Town employee or officer in response to a request for information concerning coastal erosion or Baxter Road. Additionally, as you know, communication between spouses is protected by common-law privilege. For that reason, records responsive to your request for correspondence between Selectman Atherton and his wife will be withheld from disclosure unless such correspondence was sent or received by Selectman Atherton in his official capacity.

Exemption (a) provides that documents may be withheld where they are "specifically or by necessary implication exempted from disclosure by statute." G.L. c.4, §7(26)(a). This section has been interpreted to mean that requested materials may be withheld where the language of the statute of exemption relied upon expressly states or necessarily implies that the public's right to inspect records under the Public Records Law is restricted. The Open Meeting Law, G.L. c. 30A, §§18-25 specifically addresses the confidentiality of materials related to strategy with respect to litigation, negotiations and consideration of the value of real property, and other matters authorized by statute. Thus, to the extent that any responsive records concern litigation, value of real property, or other matters properly considered in executive session, such matters will be withheld from disclosure during the pendency of the matter being considered in executive session.

Certain records may also be exempt pursuant to exemption (c) to the Public Records Law. Exemption (c), known as the "privacy exemption," will permit the withholding of any records that contain details "of a highly personal nature." Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 625 (1980). Such information includes, but is not limited to, personal financial information, marital status, legitimacy of children, paternity, medical condition, government assistance, substance abuse, family disputes and reputation. Id., 380 Mass. at 626 n.2. Thus, responsive records containing details of a highly personal nature, where the privacy interest at issue outweighs the public interest in disclosure, will be withheld from disclosure pursuant to the second clause of exemption (c) of the Public Records Law. In this case, therefore, portions of responsive records may be withheld to protect details such as home addresses and telephone numbers, as well as, if applicable, dates of birth and similar matters of a private nature.

Certain responsive records may also be withheld pursuant to exemption (d). This exemption is intended to avoid release of materials which could taint the deliberative process if prematurely disclosed. The application of the exemption is limited to recommendations on legal and policy matters found within an ongoing deliberative process. Babets v. Secretary of the Executive Office of

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Human Services, 403 Mass. 230, 237 n.8 (1988). In considering exemption (d), the court in General Electric Company v. Department of Environmental Protection, 429 Mass. 798, 807 (1999) stated, "The purpose of exemption (d) is to foster independent discussions between those responsible for a governmental decision in order to secure the quality of the decision." Id. Thus, any records that relate to ongoing deliberative matters, including litigation, or other ongoing matters of a policy nature, will be withheld under exemption (d). Additionally, any records that may be responsive to your request but which constitute personal notes not maintained in the Town's official files, and which have not been shared with any other person, will be withheld under exemption (e) of the Public Records Law.

For ease of reference, I have combined your requests to the Board of Selectmen and Conservation Commission, and have assigned paragraph numbers thereto, as follows:

1. Any and all records concerning Baxter Road, including any proposals to extend, repair, alter, or maintain Baxter Road.
2. Any and all communications regarding coastal erosion between Rick Atherton or any member of the Conservation Commission and any other party, including: Millone & MacBroom; the Nantucket Conservation Commission; the Nantucket Coastal Conservancy and/or any of its members or officers, including D. Anne Atherton and Mike Gillies; and the Nantucket Land Council, including Cormac Collier.
3. Any and all communications regarding Baxter Road between Rick Atherton or any member of the Conservation Commission and any other party, including: Millone & MacBroom; the Nantucket Conservation officers, including D. Anne Atherton and Mike Gillies; and the Nantucket Land Council, including Cormac Collier.
4. Any and all communications regarding the Siasconset Beach Preservation Fund between Rick Atherton or any member of the Conservation Commission and any other party, including: Millone & MacBroom; the Nantucket Conservation Commission; the Nantucket Coastal Conservancy or any of its members or officers, including D. Anne Atherton and Mike Gillies; and the Nantucket Land Council, including Cormac Collier.
5. Any and all communications between Rick Atherton and any other individual or entity regarding coastal erosion or Baxter Road.

In response to Paragraph 1, the Board of Selectmen has indicated that you may find documents responsive to your request at: http://www.nantucket-ma.gov/Pages/NantucketMA_BOS/BaxterRoad. This information may, of course, be accessed at your discretion, and has no cost associated therewith. The Town assumes that this information is sufficiently responsive to your request to the Board of Selectmen. If that is not the case, then the Town will provide an estimate of the cost to review all records in the custody of the Board of Selectmen for such purposes.

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In response to Paragraphs 1 through 4, the Conservation Commission has indicated that documents responsive to the above four bulleted requests number approximately 36,000. Such documents may be photocopied at a cost of \$.20 per page, or \$7,200.00, plus the time needed for the copies to be made billed at \$19.00 per hour (the hourly rate of the lowest paid person in the Conservation Commission office capable of doing the same). It is difficult to properly anticipate the amount of time needed to make such copies, but it can be assumed such copying could take days (perhaps three eight-hour days for a total of \$432.00). Should you wish to have copies of such documents, the Town will explore whether there are available copying services for such purposes, and would assess the actual cost of such copies as well as the time needed for staff to be present for that period. In the alternative, arrangements may be made to review the responsive records at the Commission's office at a mutually agreeable time.

To the extent that Selectmen Atherton, the other members of the Board of Selectmen and the Conservation Commission may have e-mails responsive to Paragraphs 1 through 5, above, the Town has the following response. First, with respect to Mr. Atherton's e-mails, it is anticipated that it will take approximately 15 hours to search for responsive records and review the same preliminarily. It is further anticipated that it may take two to five additional hours to segregate exempt from non-exempt information from responsive records. Staff assistance with this project will be assessed at the rate of \$29.67 an hour, the hourly rate of the lowest paid person capable of doing the same in the Board's office for a total of \$296.70 for search time, and a rough estimate of 500 pages at \$.50 page (computer printouts), for a total of \$546.67.

As drafted, the request would also require the other members of the Board of Selectmen and all the members of the Conservation Commission to review their private e-mail accounts for such purposes. Estimates of the time needed for such purposes will be compiled and forwarded to you separately.

Town officials and employees may also have e-mail correspondence responsive to Paragraphs 1 through 5. The Town will arrange for a search of its e-mails for such purposes, and estimates that the search for these and other records responsive to your requests will take approximately 15 hours, at the rate of \$29.67, or \$445.05, and a rough estimate of 500 pages of responsive records at \$.50 page (computer printouts), for a total of \$695.05.

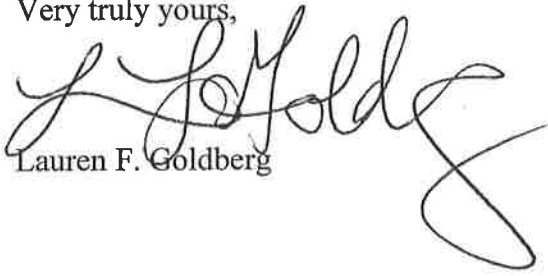
Thus, upon receipt of a check in the amount of \$8,873.72, the Town will begin the work required to respond to your request. It is anticipated that once your check is received, it will take some time to provide the requested records. While some time will be set aside each day for purposes of searching, segregating and copying responsive records, the Board of Selectmen and Conservation Commission offices must, obviously, also accomplish other Town business. Should you wish to go forward with your requests as presented, the Town will work on a schedule for such purposes.

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Pursuant to 950 CMR 32.08, you may appeal this response to the Supervisor of Public Records within 90 days.

Very truly yours,



Lauren F. Goldberg

LFG/man

cc: Town Manager
Board of Selectmen
Conservation Commission

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